

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ARTHUR MCKINNON,

Plaintiff,

v.

TAMMY NIKULA, *et al.*,

Defendants.

CASE NO. **3:20-cv-05367-BHS-DWC**

ORDER

Plaintiff brought this action under 42 U.S.C. § 1983. Dkt. 5. Before the Court is Defendants' motion for summary judgment (Dkt. 57). As discussed below, the Court will allow Plaintiff to file a supplemental response to the motion for summary judgment.

Plaintiff filed an amended complaint whose thrust is that Defendants failed to adequately treat his lower back problems and associated pain. *See* Dkt. 5, at 7. Defendants answered and the Court issued a scheduling order. Dkts. 35–36. Defendants filed their motion for summary judgment. Dkt. 57. Initially, Plaintiff did not respond to the motion.

1 The Court issued an order for supplemental briefing from Defendants on exhaustion. Dkt.
2 65. Plaintiff filed a response to the motion for summary judgment and supplement. Dkt. 69.
3 Defendants replied. Dkt. 70.

4 In its order for supplemental briefing, the Court stated that, when ruling on the motion for
5 summary judgment, it would consider Plaintiff's amended complaint as evidence because he
6 signed it under penalty of perjury. Dkt. 65, at 2 & n.1. However, when signing the amended
7 complaint, Plaintiff stated only that he "believe[d] the facts allege[d] to be true to the best of
8 [his] knowledge." Dkt. 5, at 18. Thus, he did not sign it under penalty of perjury (i.e., verify it).
9 *See id.*; *see also Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995) (verification of
10 complaint requires the plaintiff to sign it under penalty of perjury). Because Plaintiff did not
11 verify the amended complaint, the Court cannot consider it as evidence when ruling on
12 Defendants' motion for summary judgment. *Moran v. Selig*, 447 F.3d 748, 759 (9th Cir. 2006);
13 *Johnson v. Schneider*, No. CV 14-7429-CJC (KES), 2016 WL 3033691, at *1 (C.D. Cal. Apr.
14 21, 2016), *report and recommendation adopted*, 2016 WL 3033690 (C.D. Cal. May 26, 2016).

15 The Court's assertion that it would consider the amended complaint as evidence could
16 have led Plaintiff to believe that he had more evidentiary support for his response to the motion
17 for summary judgment than he truly did. In an abundance of caution, Plaintiff should have an
18 opportunity to file a supplemental response to the motion for summary judgment. Plaintiff may
19 submit additional evidence in support of his supplemental response. And the Court will allow
20 Defendants to submit a supplemental reply to the supplemental response.

21 Accordingly, the Court **ORDERS** as follows:

22 1. On or before **October 15, 2021**, Plaintiff **may file** a supplemental response to
23 Defendants' motion for summary judgment (Dkt. 57).
24

2. The supplemental response, whether handwritten or typewritten, **must comply** with the Local Civil Rules governing form of filings, including Rules governing text size, margin size, and line spacing. Local Civil Rule 10(e)(1).

3. Plaintiff's supplemental response **must be signed under penalty of perjury** as provided in 28 U.S.C. § 1746(2).

4. Plaintiff **may submit** additional evidence in support of his supplemental response. Any additional evidence in the form of an affidavit or declaration **must be signed under penalty of perjury** as provided in 28 U.S.C. § 1746(2).

5. On or before **October 22, 2021**, Defendants **may file** a supplemental reply to Plaintiff's supplemental response.

6. Failure to comply with this order **may result** in the imposition of any appropriate sanction and/or a recommendation that this case be dismissed.

The Clerk **IS DIRECTED TO** re-note Defendants' motion for summary judgment (Dkt. 57) for **October 22, 2021**.

Dated this 15th day of September, 2021.



David W. Christel
United States Magistrate Judge